2001

# Pacer Sport and Cycle v. Frank Myers and Carl W. Myers : Brief of Respondent

Utah Supreme Court

# IN THE SUPREME COURT OF THE STATE OF UTAH



PACER SPORT & CYCLE, INC.,
*Respondent-Plaintiff,*

vs.

FRANK MYERS and
CARL W. MYERS,
*Appellant-Defendant.*

Case No.
13839

# RESPONDENT'S BRIEF

APPEAL FROM THE ORDER OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, M. D. JONES, JUDGE, PRO TEM

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## STATEMENT OF THE CASE

This is an action wherein the appellant seeks a reversal of an order denying their motion to set aside a default judgment.

## DISPOSITION IN LOWER COURT

The Third District Court, Judge Gordon R. Hall, entered default judgment against appellant. The Third District Court, Judge M. D. Jones, Judge Pro Tem, denied the motion of appellant to set aside the default judgment.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the order denying his motion to set aside a default judgment.

## STATEMENT OF FACTS

The appellant, Carl W. Myers, will hereinafter be referred to as "Carl Myers". Reference to Frank C. Myers will be "Frank Myers." The respondent, Pacer Sport & Cycle, will hereafter be referred to as "Pacer Cycle".

The Statement of Facts set forth in Carl Myers' brief present an entirely different case to this Court than was presented to the trial court. There are few citations to the record because very few of the facts recited in Carl Myers' brief are in the record.

Carl Myers' Statement of Facts centers around the claim that Pacer Cycle agreed to furnish Frank Myers with free motorcycles. Such an agreement is denied by Pacer Cycle and is inconsistent with the Sales Contract and Security Agreement (R. 49). Pacer Cycle had agreed to provide free labor involved in the service or repair of the motorcycle (exclusive of parts) and stood ready to perform such agreement at all times. However, Frank Myers did not take advantage of the free repair agreement because he was delinquent in paying for the motorcycle and therefore avoided all contact with Pacer Cycle.

It is interesting to note that although Carl Myers argues the existence of agreement whereby the motorcycle was to be given to Frank Myers without charge, he is unwilling to state under oath in his Affidavit that such an agreement existed. Nowhere in his Affidavit does he state the existence of an agreement that the motorcycle would be given to Frank without charge. This is because such an agreement never existed.

The total record supporting the allegation that the motorcycle was to be given to Frank without charge, consists of self serving allegations of such an agreement made by Carl Myers to counsel for Pacer Cycle after the default judgment was taken (R. 35-36). The alleged agreement was never mentioned at the time of demand for payment of the sales contract (R. 34-35) or at the time of service of summons (R. 35).

Frank Myers' version of the facts has expanded during each phase of this proceeding. The present version of the facts bears no similarity whatsoever to other versions stated on previous occasions in this proceeding.

Prior to the filing of the Complaint in this action, counsel for Pacer Cycle sent a demand letter to Carl Myers. In response to that letter Carl Myers contacted the attorney for Pacer Cycle and stated that he would not pay the obligation since all of the benefits were realized by his son, Frank. (R. 34) On this occasion there was no mention of any agreement whereby Pacer Cycle was to furnish free motorcycles to Frank Myers. On the contrary, Carl Myers admitted that his signature was necessary in order to obtain credit on behalf of his son (R. 34-35).

After service of summons and Complaint on Carl Myers, he again contacted counsel for Pacer Cycle. On this occasion he was specifically informed that if he did not file an answer to the Complaint a default judgment would be taken against him which would be executed against his property (R. 35). He replied that he would not answer a complaint dealing with an obligation that

was primarily that of his son, Frank (R. 35). He was instructed to contact an attorney and respond to the Complaint and was given every opportunity to ask any questions concerning the procedure to protect himself against a judgment (R. 35). There was no mention of any agreement whereby Pacer Cycle was to furnish free motorcycles to his son. Rather, the emphasis was on the fact that his son was the one obligated under the contract and that by reason thereof the son should bear the responsibility (R. 35). There was some mention during this conversation that Pacer Cycle had agreed to provide free service and repair on the motorcycle, but no mention of any arrangement for free motorcycles (R. 35).

After the entry of default judgment, counsel for Pacer Cycle again contacted Carl Myers to advise him of the default judgment. This was the first time Carl Myers ever claimed the existence of an agreement whereby Pacer Cycle was to furnish free motorcycles to Frank Myers. The alleged agreement has always been denied by Pacer Cycle and is inconsistent with the provisions of the Sales contract (R. 49).

None of these conversations with counsel for Pacer Cycle were denied or questioned by Carl Myers in his Affidavit filed with the trial court (R. 37-38).

The second claim of Carl Myers is that he thought the telephone conversations was a sufficient answer to the Complaint. The summons which was served on Carl Myers specifically informed him that it was necessary to file an answer *"in writing with the clerk of the court"* (R.

45). In addition, during a telephone conversation with counsel for Pacer Cycle he was again informed that he was obligated to file an answer to the Complaint (R. 35). On the basis of this information, it is impossible for him to reasonably conclude that the telephone conversation itself was an answer to the Complaint since during that conversation he stated that he refused to answer (R. 35). During this same conversation he was further informed of the consequences of not filing an answer: that a default judgment would be taken against him which could be satisfied by execution upon his property (R. 35). This telephone conversation was prior to the expiration of the time for filing an answer, and long before a default judgment was taken.

Carl Myers complains that the delay of one year between service of summons and default judgment in some way justifies setting the default judgment aside. The reason for the delay arose by reason of attempts by Pacer Cycle and its assignee to locate Frank Myers and the collateral. As will be noted later, the collateral was dismantled and the parts located have a mechanics' lien against them. Frank Myers has never been located. The answer to the Complaint on behalf of Frank Myers was filed without service of summons upon him and after default judgment had been taken against his father, Carl Myers.

If anything, the delay in taking default judgment is further evidence of the absence of excusable neglect since it gave Carl Myers every opportunity to respond and assert any defenses at a proper stage of the proceedings.

## ARGUMENT

### POINT I.

### DENIAL OF APPELLANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT WAS WITHIN SOUND DISCRETION OF THE TRIAL COURT.

The only provisions of law justifying the setting aside of the default judgment are contained in Rule 60 (b) of the Utah Rules of Civil Procedure. These rules provide for relief from a final judgment for reasons of "Mistake, inadvertence, surprise or excusable neglect" or "any other reason justifying relief from the operation of the judgment."

It is apparent from the uncontroverted facts, that none of these grounds exist in the instant case. For this reason, the denial of the motion to set aside the judgment was a proper exercise of the discretion of the trial court.

Since Carl Myers was specifically informed as to his obligation to provide a written answer to the Complaint, was correctly advised as to the consequences in failing to act, and was given ample time in which to act, there are no grounds whatsoever to reasonably argue that his failure to answer was by reason of mistake, inadvertence, surprise, excusable neglect or any other reason which would justify relief from the judgment. Carl Myers had every opportunity to present any meritorious defense and willfully and knowingly refused to answer.

The sole excuse for failing to answer the Complaint is the claim that Carl Myers considered the telephone conversation with attorney for Pacer Cycle as constituting the court answer. (R. 37). If this constitutes neglect, it is far from "excusable neglect," since during the course of that conversation Carl Myers was informed that a formal answer was required and he specifically stated that he refused to make such an answer (R. 35). Having refused to answer, he cannot reasonably contend that he deemed the conversation to constitute an answer. Since he specifically refused to take any action, he could not have assumed that the action was already being taken. Willful conduct cannot constitute "neglect." It follows with even greater force that willful conduct cannot constitute "excusable neglect."

The situation involved in the instant case is similar to that involved in *Board of Education v. Cox,* 14 Utah 2d 385, 384 P.2d 806 (1963). In that case the defendant claimed he failed to answer the Complaint because he was of the opinion that it was invalid because it had not been signed by the trial judge. This Court upheld the action of the trial court in refusing to set aside the default judgment. The basis of the decision was as follows:

> "The trial judge was in an advantaged position to judge the defendant's creditability. In view of his interest, the court was not obliged to believe the somewhat feeble excuse he gave him for not paying attention to the summons: that he thought it required a judge's signature. *The summons is self explanatory to anyone who can read,* and this

> excuse is so unrealistic that the trial judge was not compelled to accept it . . . In view of these facts the trial court's conclusion that Mr. Cox's failure to heed the summons was his *deliberate choice* does not seem unreasonable." [Emphasis added]

In the instant case, the summons clearly states that the answer must be in writing (R. 45). So, as in the *Cox* case, a conclusion to the contrary is unreasonable and therefore does not constitute excusable neglect. The instant case is a much more flagrant disregard of the obligation to answer since, unlike the *Cox* case, the defendant in this case was specifically told of his obligation and clearly stated his deliberate intention not to respond to the summons.

If illness is not excusable neglect, *Warren v. Dixon Ranch Co.,* 123 Utah 416, 260 P.2d 741 (1953), certainly knowingly refusing to answer a Complaint does not constitute excusable neglect. Moreover, it has been specifically held that where notice of intent to take default judgment is communicated to the adverse party prior to taking the judgment, there is no claim for excusable neglect. *Masters v. LeSeuer,* 13 Utah 2d 293, 373 P.2d 573 (1962).

The question is one presented to the discretion of the trial judge, and will be set aside only if there is a clear abuse of discretion. *Chrysler v. Chrysler,* 5 Utah 2d 415, 303 P.2d 995 (1956); *Masters v. LeSeuer* supra; *Mayhew v. Standard Gilsonite Co.,* 14 Utah 2d 52, 376 P.2d 951 (1962). The facts before the court give no basis for a

finding that the trial court abused its discretion in these circumstances. It is apparent that the trial court found that Carl Myers willfully and knowingly refused to answer the Complaint after being fully advised of his obligation to do so and the consequences thereof. This court will not substitute its discretion for that of the trial court. *Warren v. Dixon Ranch Co.,* 123 Utah 416, 260 P.2d 741 (1953).

On page 6 of his brief, Carl Myers argues that Pacer Cycle's attorney admits a valid dispute between the parties. A reading of the Affidavit of Pacer's attorney illustrates that the argument is taken out of context. The statement was made to demonstrate the nature in which Carl Myers version of the facts expands with the passage of time and not as an admission of a valid issue between the parties.

Carl Myers further argues that by reason of alleged valid disputes, the judgment should be set aside. Pacer asserts that the time for asserting valid disputes or defenses has long since past and Carl Myers was given every opportunity to assert the defenses at a proper state of the proceeding. By asserting the claimed defenses at this point in time he is merely carrying forth his original plan to willfully and knowingly delay the proceedings and respond at his own convenience.

## POINT II.

## THERE WAS NO VIOLATION OF LAW IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT.

Under point II of his brief, Myers again attempts to assert defenses which should have been asserted in the answer which he willfully refused to file. There are two errors in this argument:

(a) The proper time for asserting defenses noted in Myers' brief have long since past. The sole issue before the court is whether the default should be set aside, not an argument of the merits of the case;

(b) Myers argument is based not only upon facts not in the record, but upon facts which are totally false.

(a) *Sole issue is discretion of Trial Court*

It is the clear intent of the Rules of Procedure to require defendant to assert any defenses in the trial court. Carl Myers has willfully refused to assert his defenses at the proper stage of the proceeding and now seeks to assert them for the first time to this Court after judgment.

The issue to be determined is not the validity of the defenses but whether the trial court abused its discretion in refusing to set aside a default judgment after a finding that the defendant has willfully refused to answer the Complaint after being put on notice that default judgment would be taken and the consequences of such a judgment.

This Court has clearly held that in reviewing an order refusing to set aside a default judgment, the only considerations are the facts and circumstances surrounding the failure to answer. The court will not review the merits of the case:

> *"We are concerned only with why he did not answer, not with what kind of answer would he give if he were so inclined.* This latter question arises only after consideration of the first question and a sufficient excuse therefrom being shown. *Board of Education v. Cox,* 14 Utah 2d 385, 384 P.2d 806 (1963) [emphasis added].

(b) *Defenses are based on a false set of facts*

The main import of Myers' brief centers around a wrongful repossession of the motorcycle. It seems odd that Carl Myers would rely on facts that he is unwilling to verify under oath. Nowhere in his Affidavit, or in any other affidavit, was there any statement that a repossession had ever taken place.

The only evidence of a repossession is at R. 50. The document (R. 50) was prepared in March, 1973 on erroneous information that the motorcycle had been repossessed in January, 1973. However, after checking the facts it was discovered that the repossession was of another motorcycle possessed by another buyer. For this reason, the document at R. 50 was never notarized and was included in the Complaint by error. The document is not referred to at all in the Complaint.

Since Myers never raised the repossession argument in the trial court, Pacer Cycle had no opportunity or reason to clarify the question of whether a repossession had taken place.

In order to avoid expending time and effort of the Court on the basis of a misunderstanding of the facts, Pacer Cycle has obtained Affidavits from the persons in-

volved on the question of repossession. If Pacer Cycle's motion to supplement the record under Rule 75 (h), Utah Rules of Civil Procedure, is granted, Affidavits stating that no repossession ever took place will be on file with the Court. The Affidavits establish that neither Pacer Cycle nor its assignee, Zions Bank, or any other person has ever repossessed the motorcycle involved. The motorcycle has been dismantled and there is a mechanics' lien against the parts that have been located.

## CONCLUSION

The sole issue before the Court is whether the circumstances surrounding the defendant's failure to answer constitute excusable neglect. The affidavits submitted by Pacer Cycle set forth these facts and they are not questioned or controverted by Carl Myers' Affidavit. These facts demonstrate that the trial court did not abuse its discretion in finding there was no excusable neglect justifying the defendant's refusal to answer.

Respectfully submitted,

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By .....
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